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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. ~~697~~ 240.

JOHN W. BALLMANN, APPELLANT,

vs.

VIVIAN J. FAGIN, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE APPELLANT.

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Statement of the Case.

The appellant, John W. Ballmann, was committed for contempt by the district court of the United States for refusing to answer two questions propounded to him as a witness before the grand jury and for failing to produce a cash book before that body. He petitioned the circuit court for a writ of *habeas corpus* to release him from the custody of the marshal, which was granted. On final hearing on the petition, the answer of the marshal, the reply, and the evidence the petition was dismissed. From that order he now appeals to this court.

The following are the facts disclosed by the pleadings and the evidence in the circuit court, which embraced the record of the contempt proceedings in the district court, including all the evidence heard by that court, which had been duly preserved and made part of the record by bill of exceptions.

On April 7, 1905, Ballmann was served with a *subpœna duces tecum* issued on that day, commanding him to attend forthwith before the grand jury and to bring with him "cash book, ledger, letter-press copy books, and all sheets showing transactions under the name of A. Smith and A. Johnson during months of December, 1904, and January and February, 1905" (Exhibit F, Rec., 43).

On the same day the grand jury reported to the court that the witness had appeared, but had failed and refused to produce the books and papers called for by the subpœna (Rec., 18). Thereupon, on the same day, the court ordered the witness to produce all books and papers within his control (Rec., 19).

On the next day, April 8, the grand jury filed charges of contempt, in which they set forth that the witness on April 7, and also on April 8, willfully failed and refused to produce "a certain cash book in use in his business," which he was "required by said subpœna to produce," and that he had refused to answer two questions with reference to the meaning of certain figures on his ledger, and that he was therefore in contempt (Rec., 19).

On the same day the court heard the charges of contempt presented by the grand jury, upon evidence, and found that the witness was "guilty of contempt of the process and orders of this court, as charged in said information filed by said grand jury," and ordered him to "produce the said cash book and answer the questions set out in said charges of contempt at 12 o'clock noon Monday, April 10, 1905, before said grand jury, and in default thereof that he be committed to and confined within the jail of Miami county

at Troy, Ohio, until he complies with the orders of this court or is discharged by due process of law" (Rec., 20).

On the day appointed, April 10, the witness appeared before the grand jury and made the following answers (Rec., 22):

> "I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had, in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.
>
> "I decline to answer the questions contained in said order of April 8, 1905, on the ground that it might tend to criminate me, and in this connection I produce a copy of a petition filed against me and others by Emanuel Oppenheimer in the court of common pleas of Hamilton county, being case No. 126,824, and I state that there are many other actions of the same kind pending against me."

The petition of Emanuel Oppenheimer, referred to in the foregoing answer of the witness, alleged that The O'Dell Company, one of the defendants named in the petition, "conducted a scheme of gambling known as a bucket shop" in the city of Cincinnati, and that the other defendants named in the petition, including the witness Ballmann, "are interested in said scheme of gambling as officers, stockholders, owners, venders and agents thereof, and otherwise." The petition sought to recover from the defendants, "by virtue of the statutes against gaming in the State of Ohio," the sum of $1,450.37, which the petition alleged that the plaintiff had lost "in and on account of the scheme of gambling maintained and conducted by the O'Dell Company," and exemplary damages in the sum of $500. Mr. Moulinier, assistant United States district attorney, was one of the counsel who signed the petition.

Thereupon, the grand jury having reported the answers

made by the witness, the court, without hearing evidence, entered the following judgment (Rec., 24):

> "The court, having heretofore ordered that John W. Ballmann appear before the grand jury for the April term (1905), and produce before said grand jury a cash book referred to in the order of the court, and to answer the questions propounded by the grand jury, as set out in its charge heretofore filed. And it appearing that the said John W. Ballmann has failed and refused to produce said book and has declined to answer said questions, it is now ordered that the said John W. Ballmann be taken into custody by the marshal and that he be confined and imprisoned within the jail of the county of Miami, at Troy, Ohio, in accordance with the former order of this court."

We have gone into details in the foregoing recital for the purpose of showing that the only charges preferred against Ballmann were those presented by the grand jury on April 7 and April 8, both of which were in writing, and that neither charged him with failing to produce any books or papers except as called for by the subpœna of April 7, which was confined to books and papers "showing transactions under the name of A. Smith and A. Johnson during months of December, 1904, and January and February, 1905" (Exhibit F, Rec., 43). On the hearing of the contempt charges not a scintilla of evidence was offered to show that the witness ever had in his possession or under his control any book or paper showing transactions with A. Smith or A. Johnson, or that he had any cash book in his possession or under his control after April 3, four days prior to the issue or service of the subpœna. The district court seems to have proceeded on the theory that in a criminal proceeding for contempt it devolves upon the defendant to prove that he is innocent and not upon the Government to prove that he is guilty.

Assignment of Errors.

We respectfully submit that the circuit court erred—

1. In not holding that the order of the district court committing the petitioner for contempt for refusing to answer the questions propounded to him by the grand jury, notwithstanding his claim that an answer thereto might criminate him, was in contravention of the fifth amendment of the Constitution of the United States and beyond the authority and jurisdiction of the court and void. We submit that the petitioner was not in contempt of court in refusing to answer the questions, but in the rightful exercise of privileges guaranteed to him by the Constitution of the United States.

2. In holding that an answer to the questions would not tend to criminate the petitioner.

3. In holding that the order of April 7, requiring the petitioner to produce before the grand jury all books and papers within his control, was not in contravention of the fourth and fifth amendments of the Constitution of the United States.

4. In holding that there was any legal evidence before the district court to show that the petitioner had been guilty of contempt in failing to produce a cash book before the grand jury or to justify his commitment on that account.

5. In holding that it was incumbent upon the petitioner to show in the contempt proceedings in the district court that the cash book, about which witnesses for the Government testified in that case, had been lost or destroyed after April 3. We submit that this ruling was in contravention of the fifth amendment, which declares that no person "shall

be compelled in any criminal case to be a witness against himself," and of the act of March 16, 1878, c. 37, 20 Stat., 30, which declares that in any proceedings in the courts of the United States against persons charged with the commission of crimes, offenses, or misdemeanors "the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him."

6. In treating as legal evidence in the contempt proceedings Dieterle's testimony therein concerning petitioner's evidence as a witness before the grand jury, and the pages from the petitioner's ledger, offered by the Government, and the evidence of witnesses for the Government concerning entries in the ledger, all of which evidence the district attorney offered and the court received in contravention of section 860 of the Revised Statutes of the United States, which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

7. In dismissing the petition and remanding the petitioner to the custody of the marshal.

8. We also submit that the order of April 8, directing petitioner to produce a cash book before the grand jury and to answer questions with respect thereto and with respect to his ledger, was in contravention of the fourth and fifth amendments of the Constitution of the United States and of section 860 of the Revised Statutes of the United States, and void.

ARGUMENT.

I.

THE APPEAL WAS PROPERLY TAKEN TO THIS COURT.

Since the question whether the witness was required to answer the questions propounded to him by the grand jury involves the construction and application of the fifth amendment of the Constitution of the United States, and the claim was made in his petition for the writ of *habeas corpus* that his commitment in that respect and others was in contravention of the Constitution, the appeal from the order dismissing his petition was properly taken to this court under section 5 of the act of March 3, 1891.

Counselman *vs.* Hitchcock, 142 U. S., 547.
Horner *vs.* United States, No. 2, 143 U. S., 570.
Dimmick *vs.* Tompkins, 194 U. S., 540.
Craemer *vs.* Washington State, 168 U. S., 124, 127.

II.

IF BALLMANN WAS PROTECTED BY THE FIFTH AMENDMENT FROM ANSWERING THE QUESTIONS, THE ORDER COMMITTING HIM FOR REFUSING TO ANSWER IS VOID, AND HE IS ENTITLED TO BE RELEASED ON HABEAS CORPUS.

If he was entitled under the Constitution to refuse to answer on the ground that an answer might criminate him, he was not in contempt of court, but in the exercise of his constitutional right in refusing to answer, and the order committing him for contempt was in contravention of the Constitution and beyond the lawful authority and jurisdiction of the court, and void. It is well settled that a petitioner will be released on *habeas corpus* in such a case.

Ex parte Fisk, 113 U. S., 713.
Counselman *vs.* Hitchcock, 142 U. S., 547.

In *Ex parte* Fisk, 113 U. S., 713, the petitioner was released on *habeas corpus* because the order of the circuit court requiring him to submit to examination by his adversary in an action at law previous to the trial was held to be in conflict with section 861 of the Revised Statutes of the United States, which provides "that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." Mr. Justice Miller said, at page 726:

> "The circuit court was, therefore, without authority to make the orders for the examination of petitioner in this case, and equally without authority to enforce these orders by process for contempt. Its order fining him for contempt and committing him to the custody of the marshal was without jurisdiction and void, and the prisoner is entitled to his release."

And again, at page 718:

> "When however a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner."

The foregoing statement of the law is quoted with approval by Mr. Justice Matthews in *Ex parte* Ayers, 123 U. S., 443, 485, and other cases to the same effect are there cited. The precise point is covered by the case of Counselman *vs.* Hitchcock, 142 U. S., 547, where the petitioner was released on *habeas corpus* from a commitment for contempt for refusing to answer questions propounded by the grand jury in the face of his claim that an answer might criminate him.

III.

THERE WAS NO EVIDENCE AND NO CIRCUMSTANCES BEFORE THE DISTRICT COURT TO JUSTIFY IT IN REJECTING THE SWORN STATEMENT OF THE WITNESS THAT AN ANSWER TO THE QUESTIONS MIGHT CRIMINATE HIM.

It is only where it is clear that an answer cannot possibly tend to criminate the witness and that his refusal to answer is therefore a fraudulent device to protect third parties that the court can disregard his sworn statement that an answer may criminate him and compel him to answer. The witness is not obliged to say of what offense he has been guilty or in what way an answer might lead to his detection or conviction, for that would defeat the very object of the privilege. The district court did not interrogate the witness or take any other steps to test the integrity of his claim of privilege, but summarily rejected it, notwithstanding his sworn statement that an answer might tend to criminate him, and, in the face of circumstances, to which we shall advert later, showing that the witness was in peril of prosecutions for perjury, for contempt of court, and for conducting a bucket shop, in all of which answers to the questions propounded by the grand jury or the production of his books might seriously implicate him.

In People *ex rel.* Lewisohn *vs.* O'Brien, 176 N. Y., 253 (1903), the public prosecutor had presented to the court of special sessions an information charging one Canfield with conducting a gambling-house at No. 5 East 44th street, in the city of New York, between January 1, 1902, and December 1, 1902. Lewisohn was subpœnaed as a witness, and after stating that he had known the defendant Canfield four or five years and that he had not been on the premises No. 5 East 44th street prior to December, 1899, was asked the following questions:

> "Q. Have you ever been in there in your life? Have you ever been in the premises No. 5 East 44th street in the city and county of New York?"

The witness refused to answer the questions on the ground that they might tend to criminate him, although the district attorney promised him immunity, and he was committed for contempt. The court of appeals unanimously affirmed an order of the appellate division discharging him from custody on writs of *habeas corpus* and certiorari, saying, at page 268:

> "It is quite impossible for the court to say to what extent the witness, if he answered, would be criminated or placed in jeopardy. He might be subjected to proceedings involving penalty or forfeiture; he might be tried and convicted as a common gambler, which is declared by statute to be a felony. All this might be accomplished without using his evidence against him if given herein."

The court recognized that cases might arise in which the mere assertion of the witness that an answer might criminate him ought not to be accepted as conclusive, saying, at page 266:

> "Where the court can see that the refusal to answer is a mere device to protect a third party, and that the witness is in no possible danger of disclosing facts that would lead to his own indictment and conviction, an answer may be insisted on."

The court added, referring to Chief Justice Marshall's decision in Burr's case:

> "It rests with the witness whether he will answer or not, except, as we have pointed out, where the refusal is clearly a fraudulent device to protect a third party" (176 N. Y., 267).

In People *ex rel.* Taylor *vs.* Forbes, 143 N. Y., 219 (1894), the relator was released by the court of appeals from a com-

mitment for contempt for refusing to answer certain questions while testifying before the grand jury, which was investigating outrages perpetrated in connection with the annual banquet of the freshmen class of Cornell University on the evening of February 20, 1894. While the banquet was in progress a quantity of chlorine gas, of poisonous power, was injected into the dining hall and the adjoining kitchen, causing the death of a colored servant in the kitchen and the serious illness of many of the freshmen. The result was produced by placing two jugs in a room just below the dining hall, containing the essential chemicals and substances for the generation of the gas, which was conducted into the kitchen and dining hall by means of rubber tubes placed over the mouth of the jugs and passed upward through holes for that purpose bored in the ceiling and floor above.

The witness, who was a member of the sophomore class, testified in the boadest terms before the grand jury that he had no connection whatever with the transaction. He was then asked if he knew where the jugs were purchased, who purchased them, when purchased, and to whom they were delivered after they were purchased, but declined to answer any of the questions, claiming that he might criminate himself. The lower court held that this claim of privilege was inconsistent with his voluntary statement to the grand jury that he had no connection with the transaction and was interposed as a mere pretext for shielding his friends and associates, and committed him. The court of appeals, in reversing the order and discharging the prisoner, said, at page 231:

> "The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of the answer. Where it is not so perfectly evident and manifest that the

answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected (Janvrin *vs.* Scammon, 29 N. H., 280)."

And again, page 230 :

"The witness who knows what the court does not know, and what he cannot disclose without accusing himself, must in such cases judge for himself as to the effect of his answer, and if, to his mind, it may constitute a link in the chain of testimony, sufficient to convict him, when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, indictment or trial, he may remain silent. While the guilty may use the privilege as a shield it may be the main protection of the innocent, since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that if required to disclose other facts within his knowledge he might, though innocent, be looked upon as the guilty party."

In Janvrin *vs.* Scammon, 29 N. H., 280, 290, the court said :

"The privilege is personal to the witness, and when a question is put, he in the first place decides for himself whether the answer will criminate him, and whether he will avail himself of his privilege. The court, also, will frequently interfere and inform the witness of his privilege, when they see that the question may lead to an answer tending to criminate him. When he places himself upon his privilege he will be protected, unless the court can see from the circumstances of the case that he is in error, or that it is a mere pretext on the part of the witness to avoid answering, and that his answer cannot, from the nature of things, criminate him.

"It must be manifest, however, that in many cases it will be impossible for the court to anticipate what effect the answer may have, and wherever they cannot see that he will not be criminated the privilege will be recognized and protected (State *vs.* Foster, 3 Foster's Rep., 348, and authorities there cited)."

In Counselman *vs.* Hitchcock, 142 U. S., 547, 580, Mr. Justice Blatchford correctly said that in Temple *vs.* Commonwealth, 75 Va., 892, the court of appeals of Virginia held that—

> "The great weight of authority in the United States was in favor of the rule that, when a witness on oath declared his belief that his answer would tend to criminate himself, the court could not compel him to answer, unless it was perfectly clear from a careful consideration of all the circumstances in the case that the witness was mistaken and that the answer could not possibly have such a tendency."

In *In re* Kantner, 117 Fed., 356, bankrupts were excused on an application to commit them for contempt for failing to obey an order of the court requiring them to file schedules and turn over to the receiver all their books of account, records, papers, etc., kept in their business on the claim that they might thereby incriminate themselves, and they showed that they were under indictments in a State court charging them with the crime of fraudulently removing, secreting, and disposing of property and with the crime of grand larceny in obtaining goods under false pretenses. The creditors insisted that it was for the court to determine whether the evidence will criminate them, and that the bankrupts cannot be permitted to judge for themselves, thus depriving their creditors of an opportunity to ascertain the condition of the estate, and it was urged that schedules, books, etc., would not furnish incriminating evidence.

Adams, D. J., said :

> "In a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to furnish that which cannot possibly injure him, he will not be permitted to shield himself behind the privilege, but generally the party best knows what he cannot furnish without accusing himself, and where it is not perfectly evi-

dent and manifest that the evidence called for will not be incriminating, the privilege must be allowed. Here the inculpated parties explicitly depose that the books, &c., sought to be obtained would furnish evidence against them, and so far from being able to say that it clearly appears such would not be the case, I should be inclined to believe that it would, from the nature of the evidence which the books &c. would in all probability furnish."

In Chamberlain *vs.* Willson, 12 Vt., 491, 494, Redfield, J., said:

"If he informs the court, upon oath, that he cannot testify without criminating himself, the court cannot compel him to testify, unless they are fully satisfied such is not the fact, *i. e.*, that the witness is either mistaken or acts in bad faith, in either of which cases the court should compel the witness to testify."

In Warner *vs.* Lucas, 10 Ohio, 336, 338, the court, after referring to Chief Justice Marshall's decision on Burr's trial, said:

"The rule had before been laid down in general terms, that the witness is himself to be the judge, and it is difficult to perceive how the court can be the judge, if the bearing of the testimony which is sought to be disclosed is a secret locked up in the bosom of the witness, and if to give a reason why he declined to testify, should have the effect of partially revealing that secret.

"The court can only be enabled to judge, when it understands the situation of the witness. To understand that, may require a disclosure from the witness of his reasons for withholding his testimony, and yet in giving these reasons, he may furnish a necessary link in the chain of testimony against himself. The rule laid down in the case of Col. Burr, therefore, must not be considered as one of universal application, because there may be cases in which the court are absolutely unable to judge.

"But the rule was undoubtedly correct in that particular case; for the witness did voluntarily give his reasons for refusing to testify. He was desired to decipher a certain letter, and the witness was asked if he understood the cipher. He was afraid of being implicated in the misprision of treason which that knowledge might imply, but inasmuch as his present knowledge, his knowledge at the trial did not necessarily imply that he was before acquainted with the meaning of the cipher, and the contents of the letter, so as to involve him in the guilt of knowing and concealing the treason, it was held that he might testify. The court did not decide that he must testify. A case was supposed in which the witness might safely answer the question proposed, without undertaking to decide whether that was the case of the witness.

"The Chief Justice, therefore, very properly limits the generality of the rule which he before laid down. He says: 'If the answer *may* disclose a fact, which forms a necessary and essential link in the chain of crime he is not bound to answer it.' 'In such a case, the witness must himself judge what his answer will be, and if he say on oath, that he cannot answer without accusing himself, he cannot be compelled to answer.' That is, inasmuch as it is impossible for the court thoroughly to understand the situation of the witness, or to comprehend the bearing which his testimony may have on his past actions and conduct, he must necessarily, in the last resort, be the judge himself what will be the effect of that testimony.

"And thus, the rule laid down on that celebrated trial does not, after all, differ materially from the rule as before understood. To make the witness the judge what will be the effect of his answers, might seem to be fraught with great danger and inconvenience, but in reality it has none of these inconveniences. It happens in this, as in a great many other instances, that as soon as a theoretical rule is reduced to practice it becomes perfectly harmless. For a witness to refuse to testify because his testimony may criminate him, is at once to pronounce his own turpitude. Not one man in a thousand would, without reason, venture upon so perilous a situation. The mischief to

> the witness is so enormous as to counteract the mischief on the other side and to render the rule in its operation both a wise and salutary one."

Lawson *vs.* Boyden, 160 Ill., 613, states the rule on the burden of proof in the case of claim of privilege. It was there held that a witness cannot be deprived of his privilege, on the ground that the offense is barred by limitation, unless it appears *affirmatively* that no prosecution is pending against him, citing 29 Am. & Eng. Ency. of Law, p. 842; Bank *vs.* Henry, 2 Denio, 156; Henry *vs.* Bank, 1 N. Y., 87; Southern Ry. News Co. *vs.* Russell, 91 Ga., 808; Marshall *vs.* Riley, 7 Ga., 372; Matter of Tappan, 9 How. Pr., 395.

IV.

THE EVIDENCE BEFORE THE DISTRICT COURT SUGGESTED THAT AN ANSWER TO THE QUESTIONS OR THE PRODUCTION OF HIS BOOKS MIGHT IMPLICATE THE WITNESS IN SEVERAL WAYS.

1. The witness was already charged with criminal contempt for having failed to produce a cash book before the grand jury on the day before and on the morning of the same day, and was subject to be further prosecuted, if he had any books in his possession, for disobedience of the sweeping order of April 7, which directed him to produce all books. The court cannot say that an answer to the questions propounded by the grand jury might not lead directly or indirectly to his conviction for having withheld some book. The production of a cash book would certainly have led to that result. An affirmative answer to the questions identifying the figures on the ledger with a cash book might have led to that result. The witness could not, therefore, be required to answer the questions or to produce a cash book without infringing his rights under the fifth amendment,

and the order of the court committing him for failing to do so was beyond the power of the court and void.

2. Dieterle, foreman of the grand jury, disclosed to the court that Ballmann had testified before the grand jury that he had not used a cash book in his business during December, 1904, and January, February, March, and April, 1905 (Rec., 27). An affirmative answer to the questions propounded by the grand jury, or the production of a cash book, might, therefore, have led to the indictment and conviction of the witness for perjury.

The circuit court held that a witness who has committed perjury on April 7 or 8 is bound on April 10 to answer a question which might lead to his conviction, expressing the opinion that any other rule "would permit every witness to close his mouth when he found himself about to be cornered." The witness is permitted to close his mouth, not because he is about to be cornered, but because an answer might criminate him, and he is entitled to remain silent whenever that peril presents itself.

It was on April 8, during the hearing of the contempt charges, that Ballmann was first advised of the claim of the Government that he had testified falsely before the grand jury with respect to the use of *any* cash book in his business in December, 1904, and the following months, and that he was therefore in peril of being indicted for perjury. Immediately upon being advised of this claim of the Government he set up his privilege, and was entitled to do so. He does not admit that he testified falsely before the grand jury, but the Government insists that he did, and he is in peril. He does not admit that he testified before the grand jury, that he did not use a cash book in his business in December, 1904, and January and February, 1905, but the Government claims that he did so testify and that such is the meaning of Dieterle's testimony (Rec., 27). The solicitor general says in his brief at page 37:

> "He [Ballmann] broadly denied in reality keeping *any* cash book."

And at page 47:

> "The Government offered evidence tending to show that he [Ballmann] had denied wholly having a cash book."

Ballmann was therefore distinctly advised by the course and character of the Government's evidence at the hearing on April 8, and then for the first time, that he was in peril of prosecution for perjury, and it was his clear duty to himself and to his wife and children, and his right under the Constitution, to decline, when he was brought before the grand jury on the following Monday, April 10, to answer any question which might implicate him in that charge.

The solicitor general suggests that the witness may not be prosecuted for perjury if he answers the questions and produces the cash book, but he is not obliged to take that chance. Nothing but absolute immunity from prosecution, which the solicitor general does not offer and is not authorized to grant, can deprive the witness of his privilege, as was expressly decided in Counselman *vs.* Hitchcock.

The solicitor general also makes the novel suggestion that we are estopped from saying that silence may have been necessary to protect the witness from indictment and conviction for perjury, because in his pleadings in this case he does not admit that he is guilty of perjury. A witness who claims the privilege of silence is not required to admit that he is guilty. The protection of the Constitution is for the innocent as well as for the guilty, and he may require and claim and be accorded protection from the peril of indictment, although protesting his innocence, as was held in People *vs.* Forbes, 143 N. Y., 219.

3. Oppenheimer's petition filed in the court of common pleas, and other similar suits pending against the witness, showed

that he was being sued for penalties under the statutes of Ohio against gambling and bucket shops, and that he was charged in verified petitions with being engaged in an unlawful business. The court cannot say that an answer to the questions propounded by the grand jury or the production of his books might not lead directly or indirectly to the witness' conviction under the laws of Ohio. The production of his books and the explanation of entries thereon would naturally lead to that result, if, in fact, the business in which he was engaged and which the books recorded was illegal.

A witness or party in a Federal court is entitled to protect himself against self-crimination under a law of the State in which the court is sitting.

United States *vs.* The Saline Bank, 1 Pet., 100.

The following is the statute of Ohio against bucket shops, passed February 7, 1899, 86 Ohio Laws, 12 (3 Bates' Annotated Ohio Statutes, 4th ed., p. 3350):

> "(6934*a*–1) SEC. 1. That it shall be unlawful for any corporation, association, chamber of commerce, board of trade, copartnership or person to keep or cause to be kept within this State any bucket shop, office or other place wherein is conducted or permitted the pretended buying or selling of the shares of stock or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins, or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold, and the keeping of all such places and any such pretended buying or selling are hereby prohibited. Any corporation or person, whether acting individually or as a member, or as an officer, agent or employé of any corporation, association or copartnership, who

shall be guilty of violating this section shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars ($500.00) nor less than two hundred dollars ($200.00) and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above prescribed, shall, upon conviction, be imprisoned in the county jail for the period of six months, and if a corporation, shall be liable to forfeiture of its charter; and the continuance of such establishment, after first conviction, shall be deemed a second offense. And the foregoing provisions shall apply to any 'bucket shop,' office or other place of business within this State, conducted in pursuance of or under any agreement or arrangement with any corporation, chamber of commerce, board of trade, association, copartnership, or person within this State, who has or may have leased, or who has or may have the control or use of any line or wire of any telegraph or other means of communication with such 'bucket shop,' office or other place of business within this State, and to all persons in any way employed or engaged in maintaining and carrying on such wagering business therein, or in any connection therewith; and no person within this State shall employ or use such telegraph, or other means of communication to transmit information to such non-resident of this State of any such wagering transaction or thing prohibited by this act, and the keeping of all places hereinbefore mentioned is hereby prohibited, and such non-residents of this State, as shall cause to be violated within this State the foregoing provisions in relation to such non-residents, shall be deemed guilty of a misdemeanor committed within this State, and shall be fined or imprisoned as hereinbefore provided in this section."

There is also a general statute against schemes of chance, viz:

"SEC. 6931. Whoever, publicly or privately, as owner or agent, establishes, opens, sets on foot, carries on, promotes, makes, draws, or acts as 'backer'

> or 'vender' for or on account of, or is in any way concerned in, any lottery, 'policy,' or scheme of chance, of any kind or description, by whatever name, style, or title the same may be denominated or known, whether located, or to be drawn, paid or carried on within or without this State, or by any of the means aforesaid exposes or sets to sale anything of value, shall be fined not more than five hundred nor less than fifty dollars, and imprisonment not more than ninety nor less than ten days."

Sections 4271–4276 provide for the recovery of money lost in schemes of chance and penalties, and for the liability as principal of persons leasing premises to be used for such purposes. The supreme court of Ohio has decided that suits for the recovery of money under these statutes are actions for penalty or forfeiture (Cooper *vs.* Rowley, 29 Ohio St., 547).

4. The solicitor general has favored us with the statement outside of the record that the grand jury were investigating the theft or embezzlement of money from a national bank, that an employé of the bank was suspected, and that they were inquiring about his speculative dealings under the fictitious names of A. Smith and A. Johnson with Ballmann. Accepting this statement, it is possible that Ballmann, in the course of his examination by the grand jury, discovered that they were in fact investigating him, for section 5209 of the Revised Statutes of the United States makes it a crime for any one to aid or abet any officer, clerk, or agent of a national bank in any violation of the section. A person who assisted the speculations of a national bank clerk, with knowledge that he was using funds of the bank, might himself be liable.

All that this court knows judicially or that the circuit court knew from the record with respect to the deliberations of the grand jury is that they were investigating some offense against the laws of the United States; whether on the part of Ballmann or on the part of Ballmann and persons with

whom he had speculative transactions, or on the part of other persons, is not known. Ballmann was ordered to produce all books and papers in his control and to answer questions with respect thereto for the purpose of fastening criminal responsibility, it may be, upon himself. If this was the course of the examination the witness was protected by the Constitution from answering or producing books. He was equally protected if the disclosures related to offenses entirely distinct from those which the grand jury was investigating. He was not obliged before that body to make any answer that might tend to convict him of *any* offense under the laws of the United States or of the State of Ohio.

V.

IT IS IMMATERIAL THAT THE ANSWER OF THE WITNESS COULD NOT BE USED AGAINST HIM DIRECTLY. IT IS ENOUGH THAT IT MIGHT LEAD TO INCRIMINATING DISCLOSURES.

This was the point decided in Counselman *vs.* Hitchcock, 142 U. S., 547, and in the cases in the State courts approved in that opinion.

In Emery's case, 107 Mass., 172, the court held that a statute similar to section 860 of the Revised Statutes of the United States did not affect the constitutional right of the witness to remain silent, because his disclosures, while not receivable in evidence against him, "might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was committed, or even the *corpus delicti* itself." The court held that the Constitution "protects a person from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him."

In Counselman *vs.* Hitchcock, 142 U. S., 547, 585, the court adopted the foregoing words in declaring the proper construction of the fifth amendment. The court also said at page 564 that section 860 of the Revised Statutes of the United States did not fully protect the witness because it "would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

At page 586 Mr. Justice Blatchford said:

> "Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of crime, and of sources of information which may supply other means of convicting the witness or party."

At page 562 he said of the fifth amendment:

> "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he had himself committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

In Burr's trial, 1 Burr's Trial (Robertson's ed.), 244 (Fed. Cas. 14692*e*), Chief Justice Marshall said:

> "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual

purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime that is punishable by the laws."

VI.

THERE WAS NO LEGAL EVIDENCE TO SUSTAIN THE CONVICTION FOR CONTEMPT FOR FAILING TO PRODUCE A CASH BOOK.

If this be true the petitioner is entitled to be discharged on *habeas corpus*. It was on that ground that Watts & Sachs were discharged (190 U. S., 1, 35). The chief justice said that "there was some conflict of evidence as to Sachs' participation," but that "there was no legal evidence to sustain these convictions for contempt and the order in each case must be petitioner discharged." Mr. Justice Harlan, concurring, said (p. 36):

> "I concur in that part of the opinion of the court which shows that there was no evidence whatever upon which to base a judgment for contempt against Watts & Sachs, or either of them. That view of the evidence is sufficient to dispose of the case without reference to any other question arising on the record. My concurrence in the judgment discharging the petitioners is solely on the ground just stated."

The testimony of Ballmann's employés before the district court showed that he had used a cash book in his business up to April 3, but there was no evidence that it contained accounts of transactions with A. Smith or A. Johnson, or that it was in existence after April 3.

In order to convict the defendant it was necessary for the Government to prove that a book answering the description of the subpœna (containing transactions with A. Smith or A. Johnson) was in existence and under his control on April 7. There was no evidence of this fact or of the existence or possession of any cash book after April 3.

In Iasigi *vs.* Brown, 1 Curtis, 401, Mr. Justice Curtis said that an applicant who seeks an order for the production of a paper under section 724 of the Revised Statutes of the United States must show that the paper exists, and that it is in the possession or control of the other party. The rule in chancery was that production was not ordered unless possession was admitted in case of a party or conclusively proved in other cases.

Langdell Eq. Pl., s. 211.
Hall *vs.* Young, 37 N. H., 134, 142.
Baggott *vs.* Goodwin, 17 Ohio St., 76, 81.

In Hall *vs.* Young, *supra*, the court, speaking of *subpœnas duces tecum*, said :

> "But before the court is to be called upon to make a peremptory order that the document be produced, it must be shown *conclusively* that the witness has the power to comply with it. It is not sufficient that there is such evidence as would be competent to be submitted to a jury upon the question. Evidence may have a legal tendency to establish the fact that the witness has the document in his possession, *and yet fall far short of that conclusive character which will warrant the court in adjudging him guilty of contempt, in not complying with the order to produce it.*"

Since the proceeding in the district court was a criminal case, the Government was bound to establish the guilt of the defendant beyond a reasonable doubt.

Bessette *vs.* W. B. Conkey Company, 194 U. S., 324.
New Orleans *vs.* Steamship Company, 20 Wall., 387.

This rule required proof beyond reasonable doubt that the particular cash book, for failing to produce which the petitioner has been committed, was in existence and under his control on April 7. That is not established by proving the existence of *a* cash book on April 3.

In Bullock Electric and Mfg. Co. *vs.* Westinghouse Electric and Mfg. Co., 129 Fed., 105, 106 (C C. A., 6th cir.), Lurton, C. J., said:

> "The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be partially remedial or not, and the same rules prevail which govern in the trial of indictments, the defendant being entitled to the benefit of any reasonable doubt" (Accumulator Co. *vs.* Consolidated Electric Co., 53 Fed., 793; *In re* Acker, 66 Fed., 291; Harwell *vs.* State, 10 Lea, 544; 4 Ency. Pl. and Pr., 768 *et seq.*; U. S. *vs.* Jose, 63 Fed., 951).

The presumption of the innocence of the accused has relation to every fact that must be established to prove guilt beyond a reasonable doubt.

Kirby *vs.* United States, 174 U. S., 55.

The presumption is evidence in favor of the accused.

Coffin *vs.* United States, 156 U. S., 432.

The nature of the case and the amount and character of the proof required must be considered in determining whether there was any legal evidence to justify the conviction for failing to produce a cash book. We submit that there was none. The district court and the circuit court have

allowed conjecture and suspicion to take the place of proof. Their error is similar to that which was so severely condemned in Chaffee & Co. *vs.* United States, 18 Wall, 516.

That was an action for penalties against distillers for alleged frauds in failing to pay duty on the full amount of whiskey in their possession. The error of the trial court is thus disposed of in the opinion of Mr. Justice Field, commencing at page 543:

> "It remains to consider the exceptions taken to the charge to the jury. These are sixteen in number and are directed principally to the error which pervades the whole charge, consisting in the instruction reiterated in different forms, that after the Government had made out a primâ facie case against the defendants, if the jury believed the defendants had it in their power to explain the matters appearing against them, and did not do so, all doubt arising upon such primâ facie case must be resolved against them. As we have stated, the defendants had paid taxes on over six thousand barrels of whiskey manufactured by them between the dates mentioned in the declaration. Nearly this number was traced to consignees. By the canal certificates and railroad receipts the Government had shown in that way a transportation from Tippecanoe of over two thousand barrels more. It was admitted that no charge was to be made to the defendants for any amount they had on hand in October, 1865, although the declaration charges the possession, with the unlawful purpose, to have been between February 1st, 1865, and September 1st, 1866. The defendants endeavored to show that they had on hand at that time between two and three thousand barrels, and for that purpose called in a large number of witnesses, neighbors and others, who had visited the distillery during that period. The estimates of the amount by these witnesses differed materially, being made from recollection. The defendants were present at the trial but were not called as witnesses. It was proved that they kept books, consisting of day books, journals, and ledgers.
>
> "Now the court instructed the jury that it was a

rule, without exception, that when a party has proof in his power which, if produced, would render material facts certain, the law presumes against him if he omits to produce it and authorizes a jury to resolve all doubts adversely to his defense; that although the case must be made out against the defendants beyond all reasonable doubt in this case as well as in criminal cases, yet the course of the defendants may have supplied in the presumptions of law all which this stringent rule demanded. 'In determining, therefore, in the outset,' said the court to the jury, 'whether a case is established by the Government, you will dismiss from your minds the perplexing question whether it is so made out beyond all doubt. It need not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here, at this stage, you need say only, is the case so far established as to call for explanation.' * * * 'If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants for the claim of the Government, or any material part of it, you will then take up their testimony in view of the principle' stated, that of presuming against a party, who fails to produce proofs in his possession. And again, the court instructed the jury that the law presumed that the defendants kept the accounts usual and necessary for the correct understanding of their large business and an accurate accounting between the partners, and that the books were in existence and accessible to the defendants unless the contrary were shown, and then said to the jury, 'If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or either of them, could by their own oath resolve all doubts on this point; if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule.'

> "The purport of all this was to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet, if the Government had made out a prima facie case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. *In other words, the court instructed the jury, in substance, that the Government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into any argument to show the error of this instruction.* The error is palpable on its statement. All the authorities condemn it."

We respectfully submit that the district court and the circuit court fell into the same error in this case. The circuit court said:

> "Its loss or disappearance was not claimed by the witness (the petitioner) nor by any of the witnesses examined in respect to it. It had disappeared from the office desk, and in the light of this evidence, most of it unwilling evidence, from those associated with the petitioner in business, such a book was in his office upon April 3, and had been there for an indefinite time prior thereto. The circuit court might well assume that this book was still in the possession or under the control of Mr. Ballmann. It certainly made a case in which he was called upon to show, if such was the fact, that the book described in the evidence had been lost or destroyed after the date when it was last seen in Mr. Ballmann's possession or in his office."

The witnesses referred to by the circuit court, although employés of the defendant, were not authorized to claim any-

thing on his behalf. They were before the court only in the capacity of witnesses called by the Government. Nor was the defendant a witness or claiming anything, except that he was not guilty. He was not called upon to show anything until the Government had established his guilt, not by presumption or conjecture, but by proof beyond a reasonable doubt of every fact necessary to establish his guilt.

The solicitor general offers a new principle of procedure in criminal cases when he says at page 37 of his brief:

> "He [Ballmann] should have explained what had become of the book or why he did not know what has become of it."

The following is the reason given by the district court for reaching its conclusion:

> "Mr. Ballmann does not testify before the court, and all we have is his general statement before the grand jury that no such book ever existed. He does not come here and say that the book did exist and that he destroyed it, or that somebody had stolen it, or that it had mysteriously disappeared, without fault upon his part, and that he is unable to produce it here. He says nothing of that kind, and I feel constrained to say, upon this evidence, that that book today is within his control, if not in his actual possession."

The court overlooked the fact that it was forbidden by the act of March 16, 1878, c. 37, 20 Stat., 30, from indulging any presumption against the defendant because he did not testify, and that the court was precluded by section 860 from using against him his testimony before the grand jury that he never used a cash book. The district court found that he was guilty because he did not prove that he was innocent.

VII.

TESTIMONY BEFORE THE DISTRICT COURT WHICH WAS NOT LEGAL EVIDENCE.

Section 860 of the Revised Statutes of the United States provides that—

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

It was in violation of this statute that the district attorney offered, and the district court received over the defendant's objection, Foreman Dieterle's evidence that Ballmann had testified before the grand jury that he had not used a cash book in his business (Rec., 27). This evidence was not received for the purpose of proving that Ballmann had failed to produce a cash book. Dieterle had already testified to that fact (Rec., 27). It was offered, and improperly received, for the purpose of comparing Ballmann's testimony before the grand jury with the testimony of his clerks at the trial concerning the existence and use of a cash book, in order to discredit him and to show that he was guilty of subterfuge. But his testimony before the grand jury could not be used for that purpose under section 860. That section forbade the use of his ledger, obtained from him under the order of April 7, or of the testimony of witnesses improperly offered by the Government concerning entries thereon.

In Tucker *vs.* United States, 151 U. S., 164, 168, it was held that "discovery" or "evidence," within the meaning of section 860, includes facts or papers which a witness is compelled to produce or disclose by subpœna, interrogatory, or

other judicial process, and that the section is conceived in the same spirit as the fifth amendment.

Eliminating the foregoing illegal evidence, the only legal evidence before the court was that a cash book not shown to contain transactions with A. Smith or A. Johnson was in existence four days before the issue or service of the subpœna. This was no evidence on which to commit a man to prison. That could be done only on proof beyond a reasonable doubt that a book called for by the subpœna was in existence and under the defendant's control on April 7.

We call attention also to the course of the district attorney in offering evidence, clearly incompetent, of what his witnesses had testified before the grand jury concerning Ballmann's books (Rec., 30, 34, 35, 36, 37, 39). The court not only received this testimony, but itself put the following question to the Government's witness Kramer (Rec., 36):

"What did you tell the grand jury?"

VIII.

THE ORDER OF APRIL 7, DIRECTING BALLMANN TO PRODUCE ALL BOOKS AND PAPERS IN HIS CONTROL, WAS REPUGNANT TO THE FOURTH AMENDMENT.

In *Ex parte* Brown, 72 Mo., 83, it was held that a *subpœna duces tecum* to a telegraph operator to produce, before a grand jury, all dispatches passing between eight persons named in the subpœna within fifteen months last past, was illegal under the twenty-third section of the bill of rights of Missouri, which declares "that the people ought to be secure in their persons, papers, houses and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, can issue without describing the place to be searched or the thing to be seized, as nearly as may be, nor without probable cause, supported

by oath or affirmation," and that the operator was not bound to obey it. He was released on *habeas corpus* by the unanimous judgment of the supreme court of Missouri from the commitment for contempt, which the criminal court had imposed, for refusing to obey the subpœna.

Henry, J., delivering the opinion of the court said, at page 94:

> "To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the criminal code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

In *Ex parte* Clarke, 126 Cal., 235 (1899), it was held that an order in a civil suit on the secretary of the corporation defendant to produce its ledger, journal, stock ledger, stock journal, stock certificate book, and petty cash book, without any preliminary showing that they contained material evidence, was void under a provision of the constitution of California similar to the fourth amendment of the Constitution of the United States, and the secretary was discharged on *habeas corpus* from a commitment for disobeying the order. The court said that—

> "it was in effect a general omnibus order for the production of all defendant's books, which has always been held to be unauthorized."

The court said at page 238:

> "The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental reasons, but is of the greatest value also from mere business considerations; the exposure of a man's methods of business would frequently be highly injurious to him, and, although really solvent, might produce such embarrassments as would ruin him. His right, therefore, to the sole possession and knowledge of his private books and papers is not to be violated, except where the power to do so clearly appears."

IX.

THE ORDER OF APRIL 8, REQUIRING THE DEFENDANT TO PRODUCE A CASH BOOK, WAS UNLAWFUL UNDER THE FOURTH AND FIFTH AMENDMENTS.

If that order, as the circuit court held, refers to a cash book other than one containing transactions with A. Smith or A. Johnson, obedience to it would necessarily extort from Ballmann evidence to convict him of disobedience of the sweeping order of April 7, and would subject him to the peril of punishment for such disobedience. The order was therefore an unreasonable seizure in contravention of the fourth amendment, within the principle of the decision in Boyd *vs.* United States, 116 U. S., 616, and unlawful under the fifth amendment, because it compelled the witness, who had then also become a defendant in a criminal proceeding for contempt, to furnish evidence against himself.

In Boyd *vs.* United States, 116 U. S., 616, it was held that an order of court may amount to a seizure within the meaning of the fourth amendment. The limitation upon the reasonableness of the seizure is indicated by the declaration in the amendment that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

particularly describing the place to be searched, and the persons or *things to be seized.*"

Whenever a witness is excused from giving testimony upon the ground that an answer might criminate him, he cannot be compelled to produce books or papers which would have that effect.

Lawson *vs.* Boyden, 160 Ill., 613, 618.
Boylen *vs.* Smithman, 146 Pa. St., 255, 274.
Boyd *vs.* United States, 116 U. S., 616.
3 Wigmore Evid., sec. 2264.

We cannot permit to pass unchallenged the statement of the solicitor general that the appellant is disputing the rightful authority of courts and juries to investigate crime, and that the principle must be vindicated by a judgment of affirmance in this case. The appellant offers no such contention. He is denying only the power of a court to punish him in a criminal proceeding for failing to produce a book containing transactions with A. Smith and A. Johnson without any evidence being offered to show that such a book ever existed, or that any cash book was within his control when he was first subjected to judicial process. On the other branch of the case he invokes nothing but the guarantees of the Constitution provided by the founders of our Government for the protection of the citizen.

In Boyd *vs.* United States, 116 U. S., 616, 635, Mr. Justice Bradley said that "illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure," and added:

> "This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the

constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

We respectfully submit that the order of the circuit court should be reversed and the appellant discharged.

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